Supreme Court, U.S.
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No. 88-392

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In The

Supreme Court of the United States

October Term, 1988

W. MONROE STEPHENSON,

Petitioner,

v.

PAINE, WEBBER, JACKSON & CURTIS, INC.
AND
JAMES E. WELCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Respondent Paine, Webber, Jackson & Curtis, Inc. in Opposition

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit err in concluding that the district court's findings of fact are not clearly erroneous and that those findings bar the petitioner's recovery under the Securities Act of 1933, 15 U.S.C. § 77(a), *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78(a), *et seq.*?

2. Did the United States Court of Appeals for the Fifth Circuit err in concluding that the petitioner waived his right under 28 U.S.C. § 455(a) to complain about an alleged attorney-client relationship between the district court judge and counsel for respondent Paine, Webber, Jackson & Curtis, Inc.?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. The District Court Found That The Petitioner Failed To Satisfy His Burden of Proof, And The Court of Appeals Correctly Concluded That This Finding Is Not Clearly Erroneous 10

II. The Court of Appeals Correctly Concluded That The Petitioner Waived His Right To Complain Of An Alleged Attorney Client Relationship Between The District Court Judge And Counsel For Respondent Paine, Webber, Jackson & Curtis, Inc. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S. Ct. 1504 (1985) 11,17

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 105 S. Ct. 2622 (1985) 18, 19, 20

Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731 (5th Cir. 1986) 11

Crisis Transportation Co. v. M/V Erlangen Express, 794 F.2d 185 (5th Cir. 1986) 10

Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S. Ct. 86 (1982) 22

Gilmore v. Waterman Steamship Corp., 790 F.2d 1244 (5th Cir. 1986) 11

In Re International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980) 24

In the Matter of Multiponics, Inc., 622 F.2d 709 (5th Cir. 1980) 10

Ladas v. Savage, 284 So. 2d 852 (La. App. 4th Cir. 1973) 3

Liljeberg v. Health Services Acquisition Corp., ___ U.S. ___, 108 S. Ct. 2194 (1988) 24, 25

North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986) 10

Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407 (8th Cir. 1983) 23

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438 (1983) 11

TABLE OF AUTHORITIES–Continued

Page

Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1976) 24

Savage v. Commodity Futures Trading Commissions, 548 F.2d 192 (7th Cir. 1977) 3

Stephenson v. Paine, Webber, Jackson & Curtis, Inc., 839 F.2d 1095 (5th Cir.), *rehearing denied*, 849 F.2d 901 (5th Cir. 1988) ..... *passim*

Taylor v. Combustion Engineering, Inc., 782 F.2d 525 (5th Cir. 1986) 10

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986) 23

United States v. Conforte, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S. Ct. 568 (1980) 24

United States v. Grismore, 564 F.2d 929 (10th Cir. 1977), *cert. denied*, 435 U.S. 954, 98 S. Ct. 1586 (1978) 24

United States v. Savage, 440 F.2d 1237 (5th Cir. 1971) 3

United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S. Ct. 729 (1984) 23

United States v. Wiring, Inc., 646 F.2d 1037 (5th Cir. 1981) 11, 17

Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986) 11, 17

Webster v. Fall, 266 U.S. 507, 45 S. Ct. 148 (1925) 24

STATUTES:

28 U.S.C. § 455(a) 8, 21, 22, 23, 24

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 2

TABLE OF AUTHORITIES–Continued

Page

Securities Act of 1933, 15 U.S.C. § 77(a).... 2, 8, 11, 17

Securities Exchange Act of 1934, 15 U.S.C. § 78(a) 2, 8, 11, 17

RULES:

Fed.R.Civ.P. 41(b) 2, 7

Fed.R.Civ.P. 52(a) 10

Sup. Ct.R. 17 2

OTHER AUTHORITIES:

J. Moore, J. Lucas, H. Fink, D. Wechstein and J. Wicker, *Moore's Federal Practice* (1988) 24

Note, "Disqualification of Federal Judges for Bias or Prejudice," 46 U.Chi.L.Rev. 236 (1978)..... 23

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Respondent Paine, Webber, Jackson & Curtis, Inc. in Opposition

This case is not worthy of the attention of the Supreme Court on certiorari. The case involves no federal question as to which there is a conflict among federal circuit courts. Similarly, the decisions of the lower courts in this case do not conflict with any decision of this Court. Finally, no special or important reasons exist that merit, much less compel, review. The petitioner therefore cannot show that the case meets any of the applicable

criteria for granting certiorari stated in Rule 17 of the Rules of the United States Supreme Court.

STATEMENT OF THE CASE

Petitioner, Monroe Stephenson ("Stephenson"), filed suit in the Eastern District of Louisiana against Paine Webber Jackson & Curtis, Inc. ("Paine Webber") and a former Paine Webber broker, James Welch ("Welch"), on May 10, 1984. Stephenson contended that, between August 9, 1982 and August 22, 1983, Welch made numerous unlawful trades in Stephenson's accounts at Paine Webber. Stephenson alleged violation of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77(a), *et seq.*, the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78(a), *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and state law.

The district court conducted a bench trial in the case from June 2-5, 1986. At the close of Stephenson's case, Paine Webber and Welch moved for an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The district court, concluding that Stephenson had authorized or acquiesced in each of the disputed trades, granted the motion and entered judgment in favor of Paine Webber and Welch. Stephenson then filed a timely appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the judgment of the district court. *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095 (5th Cir.), *rehearing denied*, 849 F.2d 901 (5th Cir. 1988).

The evidence at trial showed Stephenson was anything but the naive, unsophisticated investor he attempted to portray. Stephenson graduated from Tulane University with a bachelor's degree in business administration in 1955 and with a law degree in 1958. (Tr. Vol. III, at 107).[1] He was and is intimately familiar with accounting techniques and procedures. (Tr. Vol. III, at 131, 187-88). He is an expert in the law of federal income tax. (Tr. Vol. (Unnumbered), at 31). He began trading securities on the stock market in 1962. (Tr. Vol. III, at 189). From the early to the mid-1970's, he participated as legal counsel in several securities fraud cases.[2] (Tr. Vol. III, at 190-94).

On or about September 19, 1979, Stephenson opened several accounts in New Orleans with Paine Webber – a margin account, a stock account, an options account and a commodities account. (Tr. Vol. II, at 164-65; see also Tr. Vol. III, at 195; Paine Webber Exhibit Nos. 2-5). Shortly thereafter, he signed a "Client Option Agreement and Qualification Form" and began trading in options. (Tr. Vol. III, at 201-03). His account executive, James Sanders, discussed options trading with him before Stephenson made a single options trade. (Tr. Vol. III, at 80-81).

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[1] Although the trial transcript has not been included as part of the record on this application, Paine Webber provides references to the transcript in the event the Court decides to request a copy of it.

[2] *See Savage v. Commodity Futures Trading Commissions*, 548 F.2d 192, 195 n.5 (7th Cir. 1977); *United States v. Savage*, 440 F.2d 1237 (5th Cir. 1971); *Ladas v. Savage*, 284 So. 2d 852 (La. App. 4th Cir. 1973). These cases comprise Paine Webber Exhibit No. 1.

Stephenson continued trading options throughout 1980. (Tr. Vol. III, at 203). In early 1982, Sanders left Paine Webber, and Stephenson's account was transferred to Welch, another broker in the local Paine Webber office. (Tr. Vol. III, at 58, 204). Stephenson resumed options trading through Welch, and continued such trading until late 1983. (Paine Webber Exhibit Nos. 6 and 7). During this time, Stephenson and Welch were in regular contact by telephone and in person. (Tr. Vol. II, at 180-82). Welch and Stephenson reviewed Stephenson's monthly account statements and discussed the account every month. (Tr. Vol. II, at 176-77, 181). Sanders testified that, when Stephenson was his customer, the two of them periodically reviewed confirmation slips and monthly account statements. (Tr. Vol. III, at 82-83).

Stephenson admitted he received a confirmation slip from Paine Webber shortly after every trade was entered for his account. (Tr. Vol. III, at 249-50; Tr. Vol. IV, at 49). He further admitted he received a monthly account statement from Paine Webber every month there was activity in his account. (Tr. Vol. III, at 216-17; Tr. Vol. IV, at 50). It was undisputed that these document – both the confirmation slips and the monthly account statements – provided detailed information on each transaction. They apprised Stephenson of the fact of each trade, the amount of each trade, the identify of each item traded, whether the trade was in a margin account, and the rate of interest charged on the margin account. (Tr. Vol. IV, at 49-50); *see also* Paine Webber Exhibit Nos. 6 and 7). Stephenson acknowledged that Paine Webber, in all the documents sent to him, never tried to and never did hide anything. (Tr. Vol. III, at 207-08).

Stephenson's testimony at trial regarding the alleged wrongdoing in his account was inconclusive, inconsistent, unpersuasive and, in the words of the district court, "bizarre." (Tr. Vol. IV, at 54, 60). Stephenson testified, for example, that he first discovered a problem in his account in October 1982 when he received and read a Paine Webber mailgram containing a margin call for almost $4,000 for a trade he subsequently alleged he had not authorized. (Tr. Vol. III, at 210-11, 219; *see also* Paine Webber Exhibit No. 8). He admitted, however, that he did not discuss the matter with anyone other than Welch, and did nothing else to investigate the matter, until almost one year later. (Tr. Vol. III, at 216-19, 240). He also testified that he never bothered, until sometime in August 1983, to open a single confirmation slip or a single monthly account statement to ascertain whether this or any of the other allegedly unauthorized trades had been reversed. (Tr. Vol. III, at 216-18, 250-52):

> Stephenson: [Until August 1983], I didn't open any of the statements. They went into an out box and the secretary filed them.
>
> Counsel: If I understand your testimony, Mr. Stephenson, and correct me if I'm wrong, you never opened a confirmation until after August 8, 1983, when you returned from vacation; is that correct or incorrect?
>
> Stephenson: That is correct.
>
> (Tr. Vol. III, at 216-17, 250).

To the consternation of the court, Stephenson described the confirmation slips and monthly statements as nothing

more than "junk mail." (Tr. Vol. III, at 142; *see also* Tr. Vol. IV, at 49-51).

Stephenson did testify, however, that prior to the fall of 1983, he opened his monthly statement for December 1982, but only to read the last page, to determine the amount of margin interest he was entitled to deduct on his 1982 tax returns. He stated he simply ignored the remainder of the statement. The remainder, however, contained almost three complete pages of trading activity in an account Stephenson testified he thought was "inactive." (Paine Webber Exhibit No. 6; see also Tr. Vol. III, at 242-45). Had Stephenson read the entire statement, he would have noticed that the first allegedly unauthorized trade he claimed to have discovered had not been reversed, and that others had previously and since been made. (Paine Webber Exhibit No. 6). Had he read it and alerted Paine Webber to any genuine problems that existed, Paine Webber could have investigated the matter and resolved the problem immediately. (Tr. Vol. I, at 206-09; *see also* Tr. Vol. IV, at 60-61).

Stephenson's first written complaint about any transaction was by letter addressed to Welch dated August 24, 1983. (Paine Webber Exhibit No. 13). That letter did not so much as hint that any alleged unauthorized or otherwise unacceptable transaction had occurred prior to June 21, 1983. Indeed, the only transactions Stephenson complained of in the letter were eleven (11) recent Commodore International option trades and cash fund transactions. On August 31, Stephenson wrote another letter to Welch. (Paine Webber Exhibit No. 14). The focus in this second letter was essentially the same as in the first; again, there was no mention of allegedly

unauthorized trades. Several weeks later, however, on September 15, Stephenson wrote a third letter, markedly different from the first two. This time, without even alluding to the earlier correspondence and seemingly oblivious to the discrepancies, Stephenson listed fifty-nine (59) "unauthorized" transactions that allegedly occurred in his account. (Paine Webber Exhibit No. 15).

Each of these transactions had been reflected in account statements and in confirmation slips transmitted to Stephenson between August 9, 1982 and August 22, 1983. Paine Webber was not aware of Stephenson's allegations until F. J. Schultz ("Schultz"), the branch manager of Paine Webber's New Orleans office, saw the letter dated September 15, 1983. Schultz immediately discussed the matter with Stephenson and with Welch. Paine Webber thereafter determined that Stephenson's allegations were unfounded. Even so, by the time of trial, Stephenson's list of allegedly unauthorized trades had grown from fifty-nine (59) to sixty-seven (67). (Tr. Vol. III, at 123).

Throughout this litigation, Paine Webber and Welch consistently denied that any unauthorized or improper trades occurred in Stephenson's account. (Tr. Vol. III, at 35; Tr. Vol. IV, at 20). They also consistently argued that, even if improper trades were made, Stephenson ratified or acquiesced in every such trade. Stephenson failed to show otherwise at trial. The district court, after hearing Stephenson's case, concluded that Paine Webber and Welch were entitled to an involuntary dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. In so concluding, the district court found that Stephenson had failed to show that any trades were unauthorized or

improper and that, in any event, Stephenson was barred from recovery by the doctrines of waiver, laches and ratification. (Tr. Vol. IV, at 53-54, 58-64). The Fifth Circuit affirmed on the basis that Stephenson had failed, *inter alia*, to show that *any* of the trades in dispute were unauthorized. *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1101 (5th Cir.), *rehearing denied*, 849 F.2d 901, 902 (5th Cir. 1988).

In his petition for a writ of certiorari, Stephenson does not challenge the Fifth Circuit's rulings dismissing his claims under RICO and state law. He argues, however, that the Fifth Circuit nevertheless committed three reversible errors. First, the Fifth Circuit allegedly erred in applying a "recklessness" standard to his conduct to defeat his claim under § 12(2) of the 1933 Act. Second, the Fifth Circuit allegedly erred in applying the same standard to defeat his claim under the 1934 Act. Third, the Fifth Circuit allegedly erred in concluding that he waived his right under 28 U.S.C. § 455(a) to complain about an alleged attorney-client relationship between the district court judge and Paine Webber's counsel.

It is Stephenson, however, who has erred. The district court found that Stephenson failed to prove any wrongdoing by the defendants under the 1933 and 1934 Acts, and the Fifth Circuit held that this finding is not clearly erroneous. Since Stephenson does not and cannot reasonably object to the Fifth Circuit's conclusion, and since that conclusion alone provides a basis for denying the petition, the Court here need not even consider whether the Fifth Circuit erred in some other respect in affirming the dismissal of Stephenson's claims under the 1933 Act and the 1934 Act. Similarly, Stephenson has failed to cite

any authority, and has failed to offer a single persuasive reason, to explain why an unreasonable delay in seeking a recusal, such as occurred here, should not result in a waiver of the right to obtain a recusal.

SUMMARY OF ARGUMENT

I. The district court found Stephenson failed to prove by a preponderance of the evidence that any of the disputed trades were unauthorized or otherwise improper and thus failed to satisfy his burden of proof. (Tr. Vol. IV, at 51, 53-54, 56, 59-60). The Fifth Circuit correctly concluded that this finding was not clearly erroneous. *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1101 (5th Cir.), *rehearing denied*, 849 F.2d 901, 902 (5th Cir. 1988). Accordingly, the application for certiorari should be denied.

II. The Fifth Circuit properly ruled that Stephenson waived his right to complain about an alleged attorney-client relationship between the district court judge and Paine Webber's counsel. *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1096 n.3 (5th Cir. 1988). Additionally, no such relationship existed at any time prior to the appeal, and there is no evidence to the contrary in the record.

ARGUMENT

I. The District Court Found That The Petitioner Failed To Satisfy His Burden Of Proof, And The Court Of Appeals Correctly Concluded That This Finding Is Not Clearly Erroneous

At the close of Stephenson's case, the district court dismissed Stephenson's claims pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. That rule provides in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

"Dismissals under this rule are appropriate where the plaintiff fails to carry the requisite burden of proof." *Taylor v. Combustion Engineering, Inc.*, 782 F.2d 525, 527 (5th Cir. 1986). On appeal, after a dismissal under this rule, "[t]he district court's conclusions of law are subject to *de novo* review[.]" *Crisis Transportation Co. v. M/V Erlangen Express*, 794 F.2d 185, 187 n.5 (5th Cir. 1986). At the same time, the district court's "findings of fact are shielded by Federal Rule of Civil Procedure 52(a) and must be accepted unless clearly erroneous." *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1333 (5th Cir. 1986).

The burden of showing that a factual finding is clearly erroneous "is squarely on the appellant." *In the Matter of Multiponics, Inc.*, 622 F.2d 709, 723 (5th Cir.

1980). This burden is very heavy indeed. An appellate court may not review the evidence *de novo*. *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 734 (5th Cir. 1986). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1512 (1985). Moreover, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.; see also Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 798 (5th Cir. 1986). Additionally, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings[.]" *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1512; *see also Gilmore v. Waterman Steamship Corp.*, 790 F.2d 1244, 1246 (5th Cir. 1986). As the Fifth Circuit has stated repeatedly and unequivocally: "[A]ppellate courts should be loathe to set aside such determinations[.]" *United States v. Wiring, Inc.*, 646 F.2d 1037, 1041 (5th Cir. 1981); *see also Ruiz v. Estelle*, 679 F.2d 1115, 1131 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438 (1983).

There is no dispute here that, under both the 1933 Act and the 1934 Act, Stephenson had the burden of proving, *inter alia*, that a material misstatement or omission occurred in connection with each disputed trade. *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1098 (5th Cir.), *rehearing denied*, 849 F.2d 901, 902 (5th Cir. 1988). After carefully weighing the evidence, the

district court expressly found that Stephenson failed to satisfy this burden:

> The evidence is hopelessly in conflict as to whether Stephenson was aware of and authorized any or every trade made in his account before it was made or whether he was aware of and authorized every trade in his account before the closing date of the trade.
>
> * * * *
>
> Mr. Stephenson's account of what happened is unconvincing and at times approaches the inappropriately casual and probably the bizarre.
>
> * * * *
>
> The Court finds Mr. Stephenson's explanation of his conduct simply not believable, even assuming that Mr. Welch may have acted inappropriately, although I want to stress that evidence of that is in conflict and unclear.
>
> * * * *
>
> The testimony and evidence about whether Mr. Welch actually acted in an unauthorized manner is clouded with doubt and uncertainty and [is] really inconclusive.
>
> (Tr. Vol. IV, at 51, 53-54, 56, 59-60).

The Fifth Circuit correctly concluded that the district court's finding that Stephenson failed to satisfy his burden of proof is not clearly erroneous. *Stephenson v. Paine, Webber, Jackson & Curtis,* Inc., 839 F.2d 1095, 1101 (5th Cir.), *rehearing denied,* 849 F.2d 901, 902 (5th Cir. 1988). Indeed, that finding is not erroneous at all. The district court found Stephenson's testimony "suspect" and "simply not believable" for a variety of well-supported reasons. (Tr. Vol. IV, at 56-57). To begin with, the district

court concluded Stephenson was far from being financially naive and unsophisticated:

> Mr. Stephenson is a lawyer of nearly thirty years, and the Court has been personally familiar with Mr. Stephenson and his practice for that entire length of time. Mr. Stephenson is a noted preparer of tax returns. Mr. Stephenson's well-known business practice in the community may not be understated. As some of the exhibits indicated, he has participated extensively in business litigation. He has represented business clients, including stock brokers. He is familiar, at least, certainly with stock fraud litigation and securities litigation; whether as co-counsel or lead counsel it makes no difference.
>
> (Tr. Vol. IV, at 55-56; *see also* Tr. Vol. IV, at 59).

This finding is amply supported by the record. (Tr. Vol. III, at 107, 131, 187-88, and 190-94; *see also* Paine Webber Exhibit No. 1).

Stephenson's past investment habits also led the district court to conclude that "Stephenson's account of what happened is unconvincing[.]" (Tr. Vol. IV, at 53-54). Stephenson testified at trial that he always treated the confirmation slips, the monthly account statements, and the other documents he received from Paine Webber as nothing more than "junk mail" and that he systematically gave all the documents to his secretary, unopened, to store for him in a box until the end of the year. (Tr. Vol. III, at 142, 216-18). The district court discounted this testimony in light of the conflicting and more credible testimony of James Sanders, Stephenson's previous broker:

> Mr. Sanders testified that, when he became Mr. Stephenson's stockbroker, Mr. Stephenson tended to deal in cash only and bought stocks not on margin but for

> cash. Mr. Sanders could not testify that Mr. Stephenson did or did not open his confirmation slips, but Mr. Sanders did indeed testify that Mr. Stephenson always paid for his stocks and he never had any trouble getting the money that was due Paine Webber, which presumably came from confirmation slips opened by Mr. Stephenson.
>
> (Tr. Vol. IV, at 50).

Sanders' testimony strongly supports this finding. (Tr. Vol. III, at 82-84). Moreover, Sanders' testimony was buttressed by Welch, who testified he discussed the monthly account statements with Stephenson every month. (Tr. Vol. II, at 176-77, 181).[3]

These examples alone are sufficient to establish Stephenson's lack of credibility. Additional examples, however, are readily available. Stephenson testified, for instance, that "speculation" was not among his investment objectives when he opened his account at Paine Webber. (Tr. Vol. III, at 111-115). Nonetheless, both his Multi-Purpose New Account Form and his Client Option Agreement and Qualification Form list speculation as one of his investment objectives. (Paine Webber Exhibit Nos. 2 and 4). His Multi-Purpose New Account form also indicates he opened a commodities account, which is tantamount to expressing an interest in speculation. (Tr. Vol. IV, at 27; *see also* Paine Webber Exhibit No. 2). Both forms were filled out in 1979 by James Sanders, who

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[3] Interestingly, the secretary to whom Stephenson allegedly gave the confirmation slips, the monthly statements, and the other documents for storage did not testify.

testified he obtained the information directly from Stephenson. (Tr. Vol. III, at 75-80). When pressed by opposing counsel at trial on this very issue, Stephenson candidly admitted: "I don't think Mr. Sanders was dishonest or deceitful." (Tr. Vol. III, at 200). The district court agreed. (Tr. Vol. IV, at 28-29).

Yet another example involves the discrepancies in Stephenson's various descriptions of his losses. On his federal income tax returns for 1983 and 1984, signed under penalty of perjury, Stephenson claimed a total of $198,000.00 in losses. (Paine Webber Exhibit No. 11; Paine Webber Proffer No. 1; *see also* Tr. Vol. (Unnumbered), at 24-33). By the time of trial, however, he essentially admitted that his damages did not substantially exceed $77,032.97. (Record Excerpts, Exhibit D, "Joint Stipulation," at Exhibit A).[4]

A final example involves the discrepancies in Stephenson's letters regarding the allegedly unauthorized trades. In the first letter, dated August 24, 1983, which was also his first written complaint about his concerns, Stephenson listed only eleven (11) trades, none of which occurred prior to June 21, 1983; he did not even hint that he believed any trades to have been unauthorized. (Paine Webber Exhibit No. 13). In his second letter, dated

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[4] Stephenson argued at trial that the figure of $77,032.97 was too low in that it did not account for interest charges assessed against his account. The interest charged ($30,151.13), however, was less than the interest received ($30,266.85), so that the figure of $77,032.97 actually was too high. (Tr. Vol. (Unnumbered), at 30-31; see also Record Excerpts, Exhibit D, "Joint Stipulation," at 2; Tr. Vol. IV, at 39).

August 31, Stephenson listed no additional trades and, again, did not hint that he believed any trades to have been unauthorized. (Paine Webber Exhibit No. 14). The third letter, dated September 15, is markedly different. There, Stephenson listed fifty-nine (59) trades, dating all the way back to August 9, 1982; moreover, he asserted, for the first time, that each trade was unauthorized. (Paine Webber Exhibit No. 15). By the time of trial, the list had grown to sixty-seven (67) trades. (Tr. Vol. III, at 123).

Despite these examples,[5] Stephenson argues that no reasonable person could conclude that Welch acted with authorization. For instance, Stephenson contends he was out of town for several weeks during the spring and summer of 1983 and, because trades were made in his account while he was away, those trades were clearly unauthorized and the district court was clearly erroneous in finding to the contrary. (Appellant's Brief, pp. 21-22). Welch testified, however, that Stephenson gave him "time and price" discretion to trade in the account during Stephenson's absences. (Tr. Vol. III, at 35-38). This discretion enabled Welch to make the trades with Stephenson's authorization. The district court found here, as elsewhere, that Stephenson's story was unconvincing. (Tr. Vol. IV, at 53-54, 56, 59).

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[5] Further examples exist. *See, e.g.*, Tr. Vol. III, at 216-20; Tr. Vol. (Unnumbered), at 36 (three conflicting stories regarding 1982 Phelps Dodge trades); Tr. Vol. III, at 242-45 (remarks regarding accounts being "inactive"); Tr. Vol II, at 89-91; Tr. Vol. III, at 225-26 (conflicting testimony regarding margin interest and bond interest); Tr. Vol. (Unnumbered), at 21-23; Tr. Vol. IV, at 41-43; Record Excerpts, Exhibit E (account of tape recording); Tr. Vol. I, at 86-90 (explanation of termination notice); Tr. Vol. III, at 210-11; Tr. Vol. (Unnumbered), at 3-5 (conflicting accounts of reviewing Paine Webber mailgrams).

In conclusion, the district court found Stephenson's testimony "simply not believable." (Tr. Vol. IV, at 56). This finding was based, to a large extent, on determinations regarding the credibility of witnesses. Understandably, courts are "loathe to set aside such determinations[.]" *United States v. Wiring, Inc.*, 646 F.2d 1037, 1041 (5th Cir. 1981). "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985). Even if viewed in the light most favorable to Stephenson, the examples cited show that there are at least two permissible views of the evidence. In such situations, "the factfinder's choice between them *cannot* be clearly erroneous." 470 U.S. at 574, 105 S. Ct. at 1512 (emphasis added); *see also Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 798 (5th Cir. 1986).

Surprisingly, Stephenson never specifically challenges either the district court's finding that he failed to prove unlawful trading or the Fifth Circuit's conclusion that this finding is not clearly erroneous. Instead, he argues that both the district court and the Fifth Circuit erroneously held that he had the burden under both § 12(2) of the 1933 Act and the 1934 Act of proving that he did not act recklessly in handling his Paine Webber accounts.[6] Stephenson insists that this Court's decision in

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[6] Stephenson also argues that the Fifth Circuit failed even to consider his claim under § 12(2) of the 1933 Act. See Petitioner's Brief, at p. i. The Fifth Circuit not only considered the

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Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 105 S. Ct. 2622 (1985), reduced the burden of proof a plaintiff must satisfy to recover under the federal securities laws. This issue need not even be addressed, however, since Stephenson's claims under the federal securities laws can be disposed of on alternate grounds.[7] Since the Fifth Circuit correctly concluded that the district court's findings of fact are not clearly erroneous, and hence correctly concluded that the judgment of the district court must be affirmed, the petition for a writ of certiorari should be denied.

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claim, however, but also rejected it on the ground that Stephenson failed to satisfy his burden of proof. The court never suggested that Stephenson had to prove he did not act recklessly to recover:

> In affirming the district court's dismissal, we stated unambiguously that "plaintiff has not succeeded in demonstrating that any trades were 'unauthorized' as that term is legally defined." 839 F.2d at 1101 (emphasis added). Thus, although the § 12 claim was not separately analyzed in the panel's opinion, it was properly considered and resolved under this general finding.
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> *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095 (5th Cir.), *rehearing denied*, 849 F.2d 901, 902 (5th Cir. 1988).

[7] Stephenson's reliance on *Bateman Eichler* is misplaced. The issue there was "whether the common-law *in pari delicto* defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer." *Bateman Eichler*, 472 U.S. at 301, 105 S.

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Ct. at 2624. The question, couched in the nomenclature of the securities industry, was whether the *in pari delicto* defense bars a "tippee" from recovering from a "tipper". The Court held:

> [A] private action for damages in *these circumstances* [*i.e.*, where "tippee" sues "tipper"] may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.
>
> 472 U.S. at 310-11, 105 S. Ct. at 2629 (emphasis added).

The basis for this holding was that "[t]he *in pari delicto* defense, by denying *any* incentive to a defrauded tippee to bring suit against his defrauding tipper, would significantly undermine th[e] important goal [of exposing the unlawful conduct of the tipper]." 472 U.S. at 316, 105 S. Ct. at 2632 (emphasis added).

The Fifth Circuit aptly described Stephenson's reliance on *Bateman Eichler* as follows: "Stephenson principally contends that the Supreme Court's decision in *Bateman Eichler* . . . essentially abolished the due diligence requirement for private 10b-5 actions . . . [and,] [w]ithout citing any apposite language from *Bateman Eichler*, appellant asserts that because *Bateman Eichler* narrowed the availability of the *in pari delicto* defense in securities fraud cases brought by tippees, it correlatively expanded the scope of all private 10b-5 causes of action." *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d, 1095, 1098 (5th Cir. 1988). As the Fifth Circuit rightly noted, however, eliminating "diligence-promoting standards in private Rule 10b-5 causes of action, by a false analogy with *Bateman Eichler*, would seriously undercut the objectives of the SEC and the securities laws." *Id.* at 1099.

II. The Court Of Appeals Correctly Concluded That The Petitioner Waived His Right To Complain Of An Alleged Attorney-Client Relationship Between The District Court Judge And Counsel For Paine Webber

Stephenson next objects that the Fifth Circuit committed reversible error by ruling that, because he delayed in asserting it, he waived his right to complain about an alleged attorney-client relationship between the district

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In *Bateman Eichler*, the Court was concerned that a failure to restrict the scope of the *in pari delicto* defense would "give corporate insiders and broker-dealers 'a license to defraud the investing public with little fear of prosecution.'" 472 U.S. at 319, 105 S. Ct. at 2633 (citation omitted). A failure to restrict would "deny[ ] *any* incentive to adefrauded tippee to bring suit against his defrauding tipper[.]" 472 U.S. at 316, 105 S. Ct. at 2632 (emphasis added). In so doing, it would "significantly undermine" protection for the investing public since the government lacks the resources either to prevent or to discover false tipping on its own. 472 U.S. at 315-316, 105 S. Ct. at 2631-32. By contrast, where insider trading is not involved, application of a due-diligence requirement and the traditional affirmative defenses of waiver, laches and ratification does not give broker-dealers a "license to defraud" and does not deny investors any incentive to bring suit. Indeed, just the opposite is true. Application of a due-diligence standard, for example, gives investors every incentive to complain promptly in order to preserve their rights. Prompt complaints, moreover, protect the investing public by calling attention to alleged wrongdoing and by enabling those with authority to investigate complaints and to stop wrongdoing immediately, before additional investors are injured. Application of a due-diligence standard also reduces factual disputes and, in so doing, facilitates the investigation and resolution of legal disputes.

court judge and Paine Webber's counsel. This objection is based on 28 U.S.C. § 455(a). The objection is without merit, however, for two reasons. First, the record contains no evidence that an attorney-client relationship existed between the district court judge and Paine Webber's counsel at any time prior to the appeal, and no such relationship did exist. Hence, there is no reasonable basis for questioning the impartiality of the district court judge. Second, even if such a relationship did exist, the Fifth Circuit correctly concluded that Stephenson waived his right to complain.

The first time Stephenson expressed his belief that an attorney-client relationship existed between the district court judge and Paine Webber's counsel was on September 19, 1985, approximately nine months prior to trial. At that time, Stephenson's counsel wrote a letter to Paine Webber's counsel.[8] In the letter, Stephenson's counsel asserted that he had just discovered the alleged attorney-client relationship and demanded an explanation why he had not been told of it earlier. Several days later, on September 23, 1985, Paine Webber's counsel responded by letter, explaining that he had never represented the judge.[9] Paine Webber's counsel also invited Stephenson's counsel to raise the issue with the judge prior to trial, and agreed to meet with Stephenson's counsel and the judge to discuss the matter.

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[8] A copy of the letter is attached here as Appendix "A". A copy of the same letter was attached as Exhibit "A" to Paine Webber's brief in the Fifth Circuit.

[9] A copy of the letter is attached here as Appendix "B". A copy of the same letter was attached as Exhibit "B" to Paine Webber's brief in the Fifth Circuit.

Stephenson's counsel declined the invitation. He did not raise the issue again prior to trial, during trial, or immediately after trial. Instead, he waited to raise it until he appealed to the Fifth Circuit. Owing to this delay, however, Stephenson waived his right to complain, even if an attorney-client relationship did exist between the district court judge and Paine Webber's counsel prior to the appeal, which it did not. As the Fifth Circuit concluded: "Plaintiff has waived any objection by not raising it at an earlier stage of the litigation." *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1096 n.3 (5th Cir. 1988).

The justification for permitting waivers under § 455(a), in cases of neglect or lack of diligence, is clear. The Fifth Circuit first articulated it in *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S. Ct. 86 (1982):

> [T]he general purposes behind the statute as well as the statute's language might seem to indicate that no timeliness requirement should obtain. First, the statute is directed to judges, not to litigants, and it is meant to be self-enforcing. Thus, whenever the judge is called upon to disqualify himself he should be prepared and required to consider the propriety of his remaining on the case. Second, the purpose of this statute is to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality. That policy is not served by permitting an arguably biased judge to remain on a case simply because an incompetent or insufficiently diligent counsel failed to raise a timely objection.
>
> Despite the force of these arguments, the lack of a timeliness rule has its own problems. If disqualification may be raised at any time, a lawyer is then encouraged to delay making a § 455(a) motion as

long as possible if he believes that there is any chance that he will win at trial. If he loses, he can always claim the judge was disqualified and get a new trial. This result would not comport well with the purposes behind § 455(a). As one commentator has put it:

> The public is not likely to be convinced that a judge is any less biased merely because the facts that cast doubt upon his impartiality were not complained about until well into the proceeding. On the other hand, it might legitimately be asked whether the spectacle of an attorney dragging his opponent through a long and costly proceeding, only to conclude by moving for disqualification of the judge, is not equally detrimental to public impressions of the judicial system.

Note, "Disqualification of Federal Judges for Bias or Prejudice," 46 U.Chi.L.Rev. 236-64 n.155 (1978). Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of ensuring judicial fairness into a mere litigation stratagem. Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage.

Id. at 121.

This view is widely shared by other courts. In fact, every other court of appeals that has considered the issue has similarly concluded that a motion to recuse must be timely filed and that, if it is not, the right to complain is waived. *See, e.g., Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S. Ct. 729 (1984);

United States v. Conforte, 624 F.2d 869, 879-80 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S. Ct. 568 (1980); *In Re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954, 98 S. Ct. 1586 (1978); *Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567, 574 (4th Cir. 1975). Stephenson does not cite a single case to the contrary. *See* Stephenson's Petition, p.6.

Stephenson does suggest, however, or at least imply, that these circuit court decisions are inconsistent with the Supreme Court's recent decision in *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194 (1988). This suggestion is mistaken. In *Liljeberg*, once it had reason to believe that a basis for recusal existed, the petitioner promptly filed a motion to recuse. The issue whether a party who delays in exercising his rights under § 455(a) can waive those rights was not before the Court.[10] Indeed, the Court expressly noted that it was

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[10] As is well-established, "[w]here an issue is not argued, or though argued is ignored by the Court, or is reserved, the decision does not constitute a precedent to be followed in subsequent cases in which such an issue arises." 1B J. Moore, J. Lucas, H. Fink, D. Wechstein and J. Wicker, *Moore's Federal Practice* ¶ 0.402[2], at 37 (1988); *see also Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 149 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedent.")

"[o]f particular importance [that] this is *not* a case involving neglect or lack of due diligence by a respondent." *Id.* at 2204 n.11 (emphasis added). In any event, no basis exists for concluding either that the decisions of the circuit courts are inconsistent with this Court's decision in *Liljeberg*, or that the decisions of the circuit courts are incorrect. Stephenson's objection must therefore be rejected.

CONCLUSION

In light of the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

PHILLIP A. WITTMANN
STEPHEN H. KUPPERMAN
GEORGE C. FREEMAN, III
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APPENDIX A

LEGER & MESTAYER
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19 September 1985

Robert J. Fineran, Esq.
P. O. Box 1411
Mandeville, Louisiana 70448

Sheila M. Lambert, Esq.
Stone, Pigman, Walther,
Witmann & Hutchinson
546 Carondelet Street
New Orleans, Louisiana 70130

Re: W. Monroe Stephenson v.
Paine Webber Jackson & Curtis
Our File No.: 9-84-08

Dear Sheila and Bob:

In reference to your request that we postpone the pretrial meeting presently scheduled for 20 September, I am indeed free on Tuesday, 24 September 1985. Accordingly, I am rescheduling the meeting for my office at 2:00 p.m.

On a more sober note, I still do not have the Compliance Manual or the Paine Webber W.O.W. Manual. The fidelity bond is also still outstanding. I would remind Sheila that there is a court order requiring the production

of all of these items, and if they are not produced with sufficient time to allow complete review for inclusion in the pretrial order, I feel it only appropriate to move for an order striking Paine Webber's defenses.

Additionally, Bob has not yet responded to the recent discovery order or Magistrate Fonseca, and I would request that he do so immediately.

Finally, to the real crucial issue at hand. I was appalled to learn today that for at least some period of time Phil Wittmann has represented Judge Feldman in some form of legal proceeding. Before I determine whether to seek recusal of the Judge, recusal of defense counsel, or possibly sanctions because of the potential delay and additional expense which a recusal would certainly entail, I would like answers to the following, to which I feel I am rightly entitled:

1. What is the nature of the legal representation?

2. When did the legal representation commence?

3. Why was no disclosure made until the eve of trial?

I do not want to jump to any unwarranted conclusions; however, I believe you can understand my concern over this issue, and particularly my concern in that there was no disclosure made of this relationship. Your prompt answer to the above questions will certainly determine whether my concerns are warranted or not; I would appreciate your providing such information prior to the pretrial meeting in order that I may determine if additional issues should be raised in the pretrial order.

Looking forward to meeting with both of you on the 24th, I remain with kindest personal regards.

Sincerely,

/s/ Michael J. Mestayer
Michael J. Mestayer

MJM/dlc

APPENDIX B

STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
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September 23, 1985

By Hand 41,387

Michael J. Mestayer, Esq.
Leger & Mestayer
Ninth Floor
600 Carondelet Street
New Orleans, Louisiana 70130

Re: W. Monroe Stephenson v. Paine Webber Jackson & Curtis, Incorporated

Dear Mike:

I returned from London today to find your letter of September 19, 1985 regarding, in major part, my relationship with Judge Feldman. I do not know the source of your information which caused you to be "appalled," but I can assure you that I have never represented Judge Feldman in any form of legal proceeding. As to the specific questions that you have on page two of your letter, I respond as follows:

1. I have not represented Judge Feldman.
2. Not applicable.
3. Not applicable.

Judge Feldman and I have known each other since undergraduate days at Tulane and we attended Tulane Law

School together. During the course of our practice in this city we had several occasions in which we opposed each other in rather substantial federal litigation. As a result of that litigation, I believe that Judge Feldman and I have a mutual respect for each other's legal ability and, from time to time, we have discussed matters of concern to him, none of which ever matured into a formal legal representation. Judge Feldman may have referred to me as "his lawyer" at some point, and I am indeed honored that he feels that way. However, I do not feel that an attorney/client relationship exists between us.

For my part, I see no reason whatsoever for Judge Feldman to recluse himself in this matter, but if you feel differently I would suggest that you raise the matter with the Judge. I will be happy to meet with you and Judge Feldman at your convenience, if you think such a meeting is necessary.

Yours very truly,

Of STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

PAW/kcr

cc: Robert J. Fineran, Esq.